Orix Factoring Malaysia Sdn Bhd v E-Furnishings International Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–221 OF 2009
NALLINI PATHMANATHAN J
3 DECEMBER 2009

Banking — Banks and banking business — Loan agreement — Default — Borrower challenging calculation in statement of accounts — Whether lender may apply installment payments towards interest rather than principal — Whether mutually agreed interest rate of 25%pa excessive, unlawful and unenforceable — Whether monthly statements issued by lender challenged by borrower — Whether borrower estopped from denying existence and quantum of debt

Civil Procedure — Summary judgment — Banking — Default of confirming facilities — Whether indebtedness acknowledged by borrower — Whether monthly statements issued by lender challenged by borrower — Whether borrower estopped from denying existence and quantum of debt — Whether triable issues shown

The plaintiff had granted the first defendant certain confirming facilities. The second, third and fourth defendants were the guarantors. The first defendant breached the confirming agreement by failing to settle outstanding bills of exchange under the confirming facility on the due dates and hence this action by the plaintiff. The first defendant acknowledged its indebtedness to the plaintiff. The plaintiff sought summary judgment of its claim. The first defendant however challenged the plaintiff's calculation in the statement of accounts. The first defendant claimed that it had made six payments to the plaintiff amounting to RM10,000 but that this sum had not been utilised to reduce the principal amount. The plaintiff contended that the sum of RM10,000 was indeed taken into account but that it was within the discretion of the plaintiff to apply the proceeds paid by the first defendant towards interest rather than principal. The first defendant also claimed that the interest rate of 25%pa was excessive, unlawful and unenforceable. The plaintiff responded to this by submitting that this was agreed between the parties.

Held, allowing the plaintiff's application:

(1) The first defendant chose not to refute any of the monthly statements issued regularly by the plaintiff. As it stood, the first defendant was

estopped from denying the existence of the debt as well as the quantum claimed by the plaintiff (see para 3).

(2) There were no 'triable' issues raised. The first defendant's liability was clear as was that of the second, third and fourth defendants as guarantors (see para 8).

[Bahasa Malaysia summary

Plaintif telah memberikan defendan pertama beberapa kemudahan peraku tertentu. Defendan kedua, ketiga dan keempat adalah penjamin-penjamin. Defendan pertama memungkiri perjanjian peraku tersebut dengan kegagalan untuk menyelesaikan jumlah yang tertunggak bagi kemudahan 'bil pertukaran' di bawah kemudahan tersebut pada tarikh-tarikh matangnya dan oleh itu plaintif memulakan tindakan ini. Defendan pertama telah mengakui keberhutangannya terhadap plaintif. Plaintif cuba memperolehi penghakiman terus terhadap tuntutannya. Defendan pertama bagaimanapun mempertikaikan pengiraan dalam penyata akaun plaintif. Defendan pertama mendakwa yang ia telah membuat enam pembayaran kepada plaintif berjumlah RM10,000 tetapi jumlah ini tidak digunakan untuk mengurangkan jumlah prinsipal. Plaintif menyatakan bahawa jumlah RM10,000 sesungguhnya telah diambil kira tetapi ianya adalah dalam budi bicara plaintif untuk menggunakan jumlah yang dibayar oleh defendan pertama bagi pembayaran terhadap faedah tertunggak daripada terhadap jumlah prinsipal. Defendan pertama juga mendakwa bahawa kadar faedah 25% setahun adalah berlebihan, tidak sah dan tidak boleh dikuatkuasakan. Plaintif memberi respons dengan menghujahkan bahawa ianya telah dipersetujui antara pihak-pihak.

Diputuskan, membenarkan permohonan plaintif:

(1) Defendan pertama memilih untuk tidak menyangkal mana-mana kenyataan-kenyataan bulanan yang selalu dikeluarkan oleh plaintif. Oleh itu, defendan pertama adalah diestop daripada menafikan kewujudan hutang tersebut serta jumlah yang dituntut oleh plaintif (lihat perenggan 3).

(2) Tiada apa-apa isu yang perlu dibicara yang dibangkitkan. Liabiliti defendan pertama adalah jelas sebagaimana liabiliti defendan kedua, ketiga dan keempat sebagai penjamin-penjamin (lihat perenggan 8).]

Notes

For cases on banking in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7119–7121.

For cases on loan agreement, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1985–1987.

Cases referred to

Cempaka Finance v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)

Legislation referred to

Contracts Act 1950 s 61

Kingston Tan (Heiley Hassan, Tan & Partners) for the plaintiff.
YH Thoo (Halim Hong & Quek) for the defendants.

Nallini Pathmanathan J:

[1] The plaintiff by this application seeks summary judgment against the four named defendants. Vide letter of offer dated 1 October 2004 and a confirming agreement dated 5 October 2004, the first defendant applied for and was granted confirming facilities by the plaintiff. The second, third and fourth defendants are guarantors and indemnifiers under a letter of guarantee and indemnity dated 5 October 2004. They are the directors of the first defendant.

[2] The plaintiff's cause of action against the defendants arose when the first defendant breached the confirming agreement by failing to settle outstanding bills of exchange under the confirming facility on the due dates. The plaintiff through its solicitors issued a letter of demand dated 30 April 2008, to which it received no reply. It is relevant that monthly statements of accounts were sent to and received by the first defendant throughout the tenure of the facility. The plaintiff has annexed its statement of account as of 31 March 2008 showing the total amount outstanding as of that date, being RM321,847.40. The monthly statements of account issued by the first defendant stipulate that: 'The entries and balances shown above are deemed correct and conclusive unless ORIX Factoring Malaysia Sdn Bhd receive notification in writing of any discrepancy within 14 days from the statement date hereof'. Needless to say, the first defendant did not at any point in time refute any of the statements regularly issued by the plaintiff to it in respect of the confirming facilities.

[3] The defendant itself in its affidavit dated 17 June 2009 affirmed by Peh Lay Hwa exhibits a letter whereby it accepts that it is indebted to the plaintiff for the sum claimed by the plaintiff. The first defendant also proposes a repayment proposal which is suitable for it. Accordingly liability is not in issue, given the contents of this letter. Further, as pointed out by the plaintiff, the fact that the first defendant chose not to refute any of the monthly statements issued regularly by the plaintiff demonstrates that the plaintiff has

no real dispute on the issue of liability or quantum. If indeed the first defendant did dispute the accounts, it would have responded speedily as required to the statements issued, stating where the error lay. As it stands the first defendant is estopped from denying the existence of the debt as well as the quantum claimed by the plaintiff (see *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233).

[4] The first defendant at the hearing of this application in essence challenged the plaintiff's calculation in the statement of accounts maintaining that it was not accurate. Additionally it maintained that the interest rate of 25%pa is excessive, unlawful and unenforceable.

[5] On the first issue, the first defendant's contention was that it had made six payments to the paintiff amounting to RM10,000 but that this sum had not been utilised to reduce the principal amount, as the plaintiff was still suing for the principal sum of RM53,307.01. In response to this the plaintiff maintains that the sum of RM10,000 was indeed taken into account but that it was within the discretion of the plaintiff as to how such sum was to be utilised. There is no dispute that the trust receipts are overdue and that they therefore attract interest. Relying on s 61 of the Contracts Act 1950, it was maintained that the plaintiff was well within its rights to apply such proceeds as it saw fit. Section 61 of the Contracts Act provides that 'Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to limitation of suits'. As such the plaintiff is entitled to apply the proceeds paid by the first defendant towards interest rather than principal.

[6] As for the challenge to computation, this issue has been dealt with above where the fact that the first defendant chose not to challenge the regular statements of account issued to it, prohibits the first defendant from now so doing on the basis of estoppel. Further and in any event there is a conclusive evidence clause in the confirming agreement and a certificate of indebtedness, exh F in encl 4 has been exhibited. In view of the conclusive evidence clause the quantum stated therein is evidence of the amount due and owing unless the first defendant is able to demonstrate manifest error (see *Cempaka Finance v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544).

[7] As for the issue of interest being levied at 25%, the plaintiff responds to this by submitting that this was agreed between the parties. Indeed para 2 of the plaintiffs letter of offer dated 1 October 2004 stipulates that overdue

A interest is to be levied at 25%pa. This is to be read together with item 7 of the confirming agreement. As such the levy of interest at that rate is neither unlawful nor wrongful.

B **[8]** On a consideration of the matters raised by the first defendant it appeared to this court that there were no 'triable' issues raised. The first defendant's liability is clear as is that of the second, third and fourth defendants as guarantors. Accordingly I granted judgment to the plaintiff in terms of prayer (a). Prayer (b) was amended to take into account the RM10,000 that the first defendant disputed, so as to read: 'Overdue interest C at the rate of 25%pa on the principal sum ie RM191,992.58 commencing from 1 April 2008 until the date of final settlement.' In essence a sum of RM10,000 was deducted from the principal sum claimed of RM201,992.58 in order to meet the first defendant's grievance about the application of the part payments made. At the hearing of this application, the defendants' D solicitor appeared to accept the same as addressing the concerns he had raised. Costs of RM500 were granted to the plaintiff.

Plaintiff's application allowed.

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Reported by Kanesh Sundrum

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